FILED

001643 APR 26 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY ALEXANDER JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a district court's failure to advise a defendant who is represented by counsel at his guilty plea hearing that he has the right to the assistance of counsel at trial, as required by Federal Rule of Criminal Procedure 11(c)(3), is subject to plain-error, rather than harmless-error, review on appeal when the defendant fails to preserve the claim of error in the district court.

2. Whether, in determining if a defendant's substantial rights were affected by a district court's failure to satisfy the requirements of Federal Rule of Criminal Procedure 11(c)(3), a court of appeals must confine itself to reviewing the transcript of the guilty plea colloquy, or whether the court may also consider other parts of the official record.

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In the Supreme Court of the United States

No.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The decision of the court of appeals (App., *infra*, 1a-8a) is unpublished, but the decision is available at 2001 WL 66244.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

1. Rule 11(c) of the Federal Rules of Criminal Procedure, titled "Advice to Defendant," provides, in pertinent part:

> Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> * * * * *
>
> (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination[.]

2. Rule 11(h) of the Federal Rules of Criminal Procedure, titled "Harmless Error," provides: "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."

3. Rule 52 of the Federal Rules of Criminal Procedure, titled "Harmless Error and Plain Error," provides:

> **(a) Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> **(b) Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Following a guilty plea, respondent was convicted in the United States District Court for the Central District of California on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). App., *infra*, 9a-12a. Respondent was sentenced to 108 months' imprisonment, to be followed by five years' supervised release. *Id.* at 10a. The court of appeals reversed respondent's conviction and sentence, and remanded to allow respondent to replead. *Id.* at 1a-8a.

1. On December 10, 1996, a federal grand jury returned a one-count indictment charging respondent with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). Resp. C.A. Ex. Rec. 5-6. On December 16, 1996, respondent appeared in court, represented by appointed counsel, for his post-indictment arraignment. Gov't C.A. Ex. Rec. 6. The magistrate judge advised all of the defendants present, including respondent, of their constitutional rights, including the right "to be represented by counsel at all stages of the proceedings," and also advised the defendants that, "[i]f you do not have the money or means to hire an attorney, I will appoint an attorney to represent you without cost or expense to you." *Id.* at 3. The court, acting through the clerk, then asked respondent whether he had "hear[d] and underst[ood] the statements of this court pertaining to [his] rights and the appointment of counsel," to which respondent stated "[y]es." *Id.* at 6.

During this proceeding, respondent also executed a "Statement of Defendant's Constitutional Rights," in which he acknowledged his constitutional right "to be represented by counsel at all stages of the proceedings against [him]." C.R. 15, at 1. Respondent's counsel also

signed a statement at the end of that form indicating that counsel was "satisfied that [respondent] has read this Statement of Rights * * * and that [he] understands them." *Id.* at 2. That document was filed in the record of this case.

On September 22, 1997, respondent was evaluated by a psychiatrist pursuant to a court order granting his counsel's request. The purpose of the examination was to determine whether respondent suffered from diminished capacity or was otherwise vulnerable to coercion. See Gov't Sealed C.A. Ex. Rec. 33.[1] During the examination, respondent provided a detailed description of the July 1, 1996, robbery and fully admitted his role in that crime. The psychiatrist's report concluded that, while respondent had a history of mental illness that would require continued treatment, he was competent to stand trial, and understood the nature of the charges, the nature of the legal proceedings, and his relationship to all of the figures in his case. See *id.* at 40.

On February 9, 1998, respondent, assisted by his counsel, entered into a written plea agreement in which he agreed to plead guilty to armed bank robbery. See Gov't Sealed C.A. Ex. Rec. 1-8. In a section of the agreement titled "Waiver of Constitutional Rights," respondent admitted that he understood that his guilty plea would give up various constitutional rights, including the right to the assistance of counsel at trial. *Id.* at 6. Respondent and his counsel both signed the plea agreement, as did the prosecutor. *Id.* at 8.

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[1] Certain materials in the record, including the psychiatrist's report and the plea agreement, were sealed below pursuant to the Advisory Committee Note to Ninth Circuit Rule 27-13 (July 1995). Our discussion of those materials in this case follows our discussion in the unsealed briefs that were filed in the court of appeals.

Later that day, after the plea agreement was finalized, respondent, represented by his counsel, appeared before the district court for a status conference, at which respondent expressed his desire to plead guilty. Resp. C.A. Ex. Rec. 9-10. After confirming with respondent that he "understood the basic plea agreement," *id.* at 10, the court proceeded to engage in a colloquy with respondent, as required by Rule 11 of the Federal Rules of Criminal Procedure, to ensure that respondent's guilty plea was voluntary and intelligent and contained an adequate factual basis. During the course of that colloquy, the court advised respondent of the statutory maximum sentence and the "elements of the crime that the government would have to prove," and satisfied itself that a factual basis existed for his plea. Resp. C.A. Ex. Rec. 10-15.

The court advised respondent that, by pleading guilty, he would surrender various constitutional rights, including the right against self-incrimination, the right to a trial by jury, the right to confront and cross-examine witnesses against him, and the right to present evidence and witnesses on his own behalf. Resp. C.A. Ex. Rec. 12-13. Respondent stated that he waived those rights. *Id.* at 13. The court did not expressly tell respondent at that time, however, that if he elected to proceed to trial, he would have the right to the assistance of counsel at that trial. Respondent's counsel did not object to that omission. The court then accepted respondent's guilty plea, finding that "there is a factual basis for the plea, that the constitutional rights are freely, voluntarily and intelligently waived and that the plea is provident." *Id.* at 15.

On March 8, 1999, the district court adopted without objection the calculations contained in the Presentence Report, which were consistent with the sentencing

factors delineated in the plea agreement. Respondent was sentenced to a term of 108 months' imprisonment. Resp. C.A. Ex. Rec. 17-22. At no time during any of the trial court proceedings did respondent seek to withdraw his guilty plea.

2. On appeal, respondent argued for the first time that his guilty plea was invalid because the district court had failed to meet various requirements of Rule 11 before accepting his guilty plea. As relevant here, respondent argued that the court violated Rule 11(c)(3) by failing to advise him of his right to the assistance of counsel at trial.[2] The court of appeals agreed and reversed the conviction and sentence. App., *infra*, 6a-8a.

At the outset, the court observed that a district court's failure to comply with Rule 11 "is reversible unless it constitutes harmless error." App., *infra*, 2a (citing Fed. R. Crim. P. 11(h) and *United States* v. *Odedo*, 154 F.3d 937, 940 (9th Cir. 1998)). In a footnote, the court noted that the government "made it clear that it does not believe harmless error is the proper standard of review," and that "plain error review is appropriate" given the absence of any objection in the district court. App., *infra*, 2a n.1. "Nevertheless," the court

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[2] Respondent also argued that the district court failed to determine whether respondent understood the essential nature of the charge against him, as required by Rule 11(c)(2), and that it deviated from Rule 11(e)(1)(B) by not advising him that, in the event that the court did not accept the sentencing recommendations in the plea agreement, he nonetheless would not be allowed to withdraw his plea. The court of appeals concluded that the district court had not failed to explain the nature of the charges to respondent, see App., *infra*, 3a-4a, and that any error in not advising respondent that he would not be allowed to withdraw his plea was harmless, see *id.* at 4a-6a.

continued, "the government concedes that under current Ninth Circuit precedent, harmless error is the standard." *Ibid.*

The court of appeals further concluded that the district court violated Rule 11(c)(3) by not advising respondent of his right to counsel at trial (which the government did not dispute), see App., *infra*, 6a, and that that error was not harmless because the government had not made an "affirmative showing" based in the transcript of the plea colloquy that respondent "was actually aware" of this right notwithstanding the court's omission, *id.* at 7a. For its conclusion that the error was not harmless, the court relied on its recent decision in *United States* v. *Vonn*, 224 F.3d 1152 (9th Cir. 2000), cert. granted, 121 S. Ct. 1185 (2001) (No. 00-973), for the proposition that, "[i]n determining what the defendant knew, we are limited to what the record of the plea proceeding contains," and that "we cannot look to any pre-plea proceedings or [respondent's] history with the justice system in determining whether he was actually aware of his right to trial counsel." App., *infra*, 7a (internal quotation marks omitted). Because all the materials that the government had cited to show that respondent was actually aware of his right to the assistance of counsel at trial predated the plea hearing, the court reversed respondent's conviction and remanded the case to permit him to replead. *Id.* at 8a.

ARGUMENT

This case presents the same issues that are currently before the Court in *United States* v. *Vonn*, cert. granted, 121 S. Ct. 1185 (2001) (No. 00-973). Relying on its earlier decisions, the court of appeals first ruled in this case that a district court's failure to advise a defendant pleading guilty of his right to the assistance

of counsel at trial, as required by Federal Rule of Criminal Procedure 11(c)(3), is always subject to appellate review under a harmless-error rather than a plain-error standard, even if the defendant did not raise that claim of error in the district court. See App., *infra*, 2a. Second, the court ruled that, in determining whether a particular Rule 11 error affected a defendant's substantial rights (and in particular whether the defendant was otherwise aware of his right to the assistance of counsel at trial), the reviewing court may not look beyond the transcript of the guilty plea hearing. *Id.* at 7a-8a. Both issues are presented by our certiorari petition in *Vonn*, which the Court granted on February 26, 2001. See 121 S. Ct. 1185. Accordingly, this petition should be held pending the Court's decision in *Vonn*, and then disposed of in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *Vonn*, No. 00-973, and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

APRIL 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-50168

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HENRY ALEXANDER JONES, DEFENDANT-APPELLANT

[Filed: Jan. 26, 2001]

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding**

Before: TROTT, THOMAS, and BERZON, Circuit Judges.

In this appeal, we conclude that Judge Ideman conducted an inadequate guilty plea colloquy with Appellant Henry Jones, and that under the law of this Circuit, the court's discrete error was not harmless. Therefore,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** Judge James M. Ideman handled the guilty plea hearing in this case. Subsequently, the case was transferred to Judge Manuel L. Real.

we reverse Jones's conviction and remand the case to the district court with instructions to allow him to re-plead.

Because the parties are familiar with the facts of this case, we recount them here only as necessary to explain our decision.

A. Standard of Review

Whether the district court complied with Federal Rule of Criminal Procedure 11 ("Rule 11") is reviewed *de novo*. *United States v. Smith*, 60 F.3d 595, 597 n.1 (9th Cir. 1995). The failure to comply with Rule 11 is reversible unless it constitutes harmless error. FED. R. CRIM. P. 11(h) ("Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."); *United States v. Odedo*, 154 F.3d 937, 940 (9th Cir. 1998) ("[W]e hold that the Rule 11(h) 'harmless error' standard applies to all Rule 11 errors, regardless of whether they were ever raised before the district court.").[3]

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[3] In its brief and at oral argument, the government made it clear that it does not believe harmless error is the proper standard of review. The government argues that when a defendant fails to object during the plea colloquy to alleged Rule 11 deficiencies, plain error review is appropriate. Nevertheless, the government concedes that under current Ninth Circuit precedent, harmless error is the standard. *Odedo*, 154 F.3d at 940. Unless and until the Supreme Court or an en banc panel of this court overrules *Odedo*, we are bound by its directives. *In re Complaint of Ross Island Sand & Gravel*, 226 F.3d 1015, 1018 (9th Cir. 2000); *Morton v. De Oliveira*, 984 F.2d 289, 292 (9th Cir. 1993).

B. Analysis

1. The District Court Properly Ensured that Jones Understood the "Nature of the Charges" to Which He Was Pleading Guilty.

Rule 11(c)(1) requires the district judge to "inform the defendant of, and determine that the defendant understands . . . the nature of the charge to which the plea is offered." FED. R. CRIM. P. 11(c)(1). The record of the plea proceeding demonstrates that the judge adhered to Rule 11(c)(1).

First, the judge asked the prosecutor to "advise Mr. Jones . . . what the government would have to do if the case went to trial." The prosecutor complied by describing the elements of the armed bank robbery statute. The judge then immediately asked, "Do you understand that, Jones?" to which Jones responded, "Yes."

Soon thereafter, the judge instructed the prosecutor to explain "what the case against [the defendant] would be if this case went to trial," and advised Jones to "listen to what [the prosecutor] says and if you agree, then, you tell me that." The prosecutor explained in detail the factual circumstances of the armed bank robbery. The judge then asked Jones whether that factual statement was correct, to which Jones again responded, "Yes."

We recently approved of a similar procedure in an analogous case. *United States v. Timbana*, 222 F.3d 688, 703 (9th Cir. 2000). Rejecting the defendant's argument that the court was required to have the defendant "explain in his own words what he had done,"

we found no error where the district judge instructed the prosecutor to list the elements of the offense and to recite the evidence the government was prepared to present to a trier of fact. *Id.*

This case is clearly distinguishable from *United States v. Smith*, 60 F.3d 595, 597 (9th Cir. 1995), and *United States v. Bruce*, 976 F.2d 552, 559 (9th Cir. 1992). Unlike in *Smith*, the district judge did more than simply inform Jones of the factual predicate of the offense; and, unlike in *Bruce*, the district judge provided more than a "brief, vague explanation of the information." Rather, through the prosecutor, the judge informed Jones of the elements of armed bank robbery and of the facts the government was prepared to introduce if the case went to trial. In this manner, the judge properly ensured that Jones "'possesse[d] an understanding of the law in relation to the facts.'" *Smith*, 60 F.3d at 597 (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

2. The District Judge Erred By Failing to Explain that Jones Would Not Be Allowed to Withdraw His Plea if the Court Departed from the Recommendation of the Plea Agreement, But the Error Was Harmless.

Rule 11(e)(2) states that "[i]f the [plea] agreement is of the type [B variety], the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea." FED. R. CRIM. P. 11(e)(2). It is undisputed that Jones's plea agreement

was a "type B" agreement.[4] It is likewise undisputed that Judge Ideman failed to advise Jones that if the court departed from the recommendations in the plea agreement, he would not be allowed to withdraw his plea. This failure was a violation of Rule 11(e)(2).

The government argues, however, that the court's error was harmless, and thus does not require reversal. We agree.

This case is governed by *United States v. Chan*, 97 F.3d 1582 (9th Cir. 1996). In *Chan*, the district court "adopted the PSR's findings and recommendations, to which Chan made no objection . . .[,] accepted the terms of the of the [*sic*] plea agreement[,] and . . . imposed the very sentence Chan had bargained for and that had been recommended by the government and suggested in the PSR." *Id.* at 1584. We held "that when a district court adopts the government's sentencing recommendation and imposes the recommended sentence on the defendant, a failure on the part of the sentencing court to recite Rule 11(e)(2)'s prescribed warning is an error with no adverse effect on the defendant's substantial rights." *Id.*

Here, the plea agreement between Jones and the government expressly included a provision that stated, "[b]oth parties reserve the right to argue that additional adjustments and departures may be appropri-

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[4] "Type B" agreements are those where "the government will . . . recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court." FED. R. CRIM. P. 11(e)(1)(B).

ate." In the Presentence Report, the government exercised its right to argue for additional enhancements. Specifically, the government sought a six-point enhancement for Jones's use of a gun during the robbery and also a two-point enhancement for Jones's co-defendant injuring a teller during the robbery. In his sentencing memorandum, Jones did not object to either additional enhancement; rather, he only requested a downward departure based on a claim of duress.

As in *Chan*, the district court adopted the PSR's findings and recommendations, to which Jones made no objection, accepted the terms of the plea agreement, and imposed the sentence recommended by the government and suggested in the PSR. *See id.* Therefore, as in *Chan*, the error was harmless. *See id.*

3. The District Judge Erred By Failing to Apprise Jones of His Right to Be Represented By Counsel at Trial, and the Error Was Not Harmless.

Rule 11(c)(3) requires the judge to inform the defendant of his right "at . . . trial . . . to the assistance of counsel." FED. R. CRIM. P. 11(c)(3). It is undisputed that the district judge failed to inform Jones of his right to be represented by counsel at trial if he decided to plead not guilty.

In its brief, the government argues that the error does not require reversal. Specifically, the government claims that because Jones was actually aware of his right to be represented by counsel at trial, the district judge's failure to apprise him of that right during the colloquy was harmless. *See United States v. Graibe*, 946 F.2d 1428, 1435 (9th Cir. 1991) (holding that if judge commits Rule 11 error, the government must make "an

affirmative showing on the record that the defendant was actually aware of the advisement" for the error to be harmless). The government attempts to show that Jones was aware of his right to trial counsel based on earlier proceedings in this case and on his previous experience with the criminal justice system. The government relies on *United States v. Vonn*, 211 F.3d 1109 (9th Cir. 2000), for the proposition that an appellate court may look beyond the plea proceedings in determining whether a defendant was actually aware of his constitutional right to trial counsel.

However, subsequent to briefing, *United States v. Vonn*, 211 F.3d 1109 (9th Cir. 2000), was withdrawn and superceded by *United States v. Vonn*, 224 F.3d 1152, 1152 (9th Cir. 2000). The new *Vonn* opinion makes clear that "[i]n determining what the defendant knew, we are limited to what the record of the plea proceeding contains." *Id.* at 1155 (internal quotation marks and citation omitted). "The requirements of Rule 11 are so easy to follow that we will not go beyond the plea proceeding in considering whether the defendant was aware of his rights." *Id.*

At oral argument, the government forthrightly acknowledged the new *Vonn* opinion and admitted that under its analysis, we cannot look to any pre-plea proceedings or Jones's history with the justice system in determining whether he was actually aware of his right to trial counsel.[5] Thus limited by the new *Vonn*

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[5] We recognize that the government has filed a petition for certiorari in the United States Supreme Court on the *Vonn* case, arguing, *inter alia*, that appeals courts should not be limited to the four corners of the plea proceeding in determining whether the defendant was actually aware of his constitutional rights. Never-

opinion, we can find nothing in the guilty plea colloquy which demonstrates that Jones was actually aware of his right to be represented by counsel if he decided to take his case to trial. Jones's acknowledgment that he read and understood the plea agreement is not sufficient to show that he knew he had the right to counsel if he pled not guilty. *See United States v. Kennell*, 15 F.3d 134, 136 (9th Cir. 1994). Moreover, the fact that Jones was represented by counsel at the plea proceeding does not satisfy the Rule 11's requirements. *Vonn*, 224 F.3d at 1156. "The drafters of [Rule 11] . . . did not consider the admonition redundant simply because defendant is represented by counsel at the plea hearing." *Id.* Finally, Jones made no statements in the colloquy which might suggest that he was aware of his constitutional right to trial counsel.

Therefore, Judge Ideman's Rule 11(c)(3) error was not harmless. Accordingly, we reverse Jones's conviction and remand the case to the district court to allow Jones to re-plead. *See Smith*, 60 F.3d at 600 ("Because Rule 11(c)(1) was violated and the error was not harmless, [defendant] must be allowed to replead.") (citation omitted).

REVERSED AND REMANDED.

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theless, we decline the government's invitation to stay this case pending the Supreme Court's decision on whether to grant certiorari. Unless and until the Supreme Court or an en banc panel of this court overrules *Vonn*, we are bound by its directives. *In re Complaint of Ross Island Sand & Gravel*, 226 F.3d at 1018; *Morton*, 984 F.2d at 292.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CR-1106-R

UNITED STATES OF AMERICA

v.

HENRY ALEXANDER JONES, JR.

Residence: Metropolitan Detention Center
535 North Alameda Street
Los Angeles, Ca 90012

Mailing: Same

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person, on: March 8, 1999
Month/Day/Year

COUNSEL:

However, the court advised defendant of the right to counsel and asked if defendant desired to have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

XX WITH COUNSEL John Yzurdiaga, appointed

PLEA:

XX GUILTY, and the Court being satisfied that there is a factual basis for the plea.

___ NOLO CONTENDERE _____ NOT GUILTY

FINDINGS:

There being a finding of _____ GUILTY, defendant has been convicted as charged of the offense(s) of: Armed bank robbery in violation of Title 18 United States Code Section 2113(a)(d) as charged in the single-count indictment.

JUDGMENT AND PROBATION/COMMITMENT ORDER:

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court the defendant is hereby committed to the Bureau of Prisons to be imprisoned for a term of:

One hundred eight (108) months.

IT IS FURTHER ADJUDGED that upon release from imprisonment defendant shall be placed on supervised release for five (5) years under the following terms and conditions: the defendant 1) shall comply with the rules and regulations of the U.S. Probation Office and General Order 318; 2) shall participate in outpatient substance abuse treatment and submit to drug and alcohol testing as instructed by the Probation Officer, and shall abstain from using illicit drugs, alcohol, and abusing prescription medications during the period of supervision; 3) shall notify the Court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments; 4) shall, if the amount of mandatory assessment imposed by this judgment remains unpaid at the commencement of community supervision, pay such remainder as directed by

the Probation Officer; 5) shall, as directed by the Probation Officer, provide an accurate financial statement with supporting documentation, as to all sources and amounts of income and all expenses of the defendant and in addition shall provide federal and state income tax returns as

IT IS FURTHER ORDERED that all fines and the costs of imprisonment and supervision of defendant are waived.

IT IS FURTHER ORDERED that defendant pay a special assessment of $100.00.

The defendant is advised of his right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

Signed by: District Judge ILLEGIBLE SIGNATURE
MANUEL L. REAL

It is ordered that the Clerk deliver a certified copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Sherri R. Carter, Clerk of Court

Dated/Filed March 10, 1999 By WILLIAM HORRELL
Month/ Day/ Year WILLIAM HORRELL,
Deputy Clerk

Supreme Court, U.S.
FILED
JUN 22 2001
CLERK

No. 00-1643

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

vs.

HENRY ALEXANDER JONES, RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent/Defendant, by his undersigned counsel, requests leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, without prepayment of costs and to proceed in forma pauperis. Counsel was appointed for Defendant on appeal under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

Dated: June 22, 2001

Jerald L. Brainin
Counsel for Respondent

No. 00-1643

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

vs.

HENRY ALEXANDER JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI

Jerald Lee Brainin
P.O. Box 66365
Los Angeles, California 90066
Telephone (310) 397-3910

Attorney for the Respondent
Henry Alexander Jones

OPINION BELOW

The decision of the court of appeals is unpublished, but the decision is available at 2001 WL 66244.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2001. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent agrees with Petitioner that this case presents the same issues that are currently pending before the Court in *United States v. Vonn*, cert. granted, 121 S.Ct. 1185 (2001)(No. 00973), and that the Court should defer further disposition pending its resolution of the *Vonn* case. Cert. Pet. 7-8.

ARGUMENT

Although the issues in both cases are identical, one procedural discrepancy bears mentioning. Respondent disagrees with the Circuit Court's and government's claim that "In its brief and at oral argument the government made it clear that it does not believe harmless error is the proper standard of review." Pet. App. at 2a, fn. 3; Cert. Pet. 6. Although this point

was mentioned during oral argument, the government did not raise or argue it in its brief. Pet. C.A. Br. at 16-22. Nowhere in the brief does the government contend that the court of appeals should evaluate Rule 11(c)(3) errors raised for the first time on appeal for plain error under Federal Rule of Criminal Procedure 52(b), rather than for harmless error under Rule 11(h). The government in fact argued that the court of appeals should evaluate Rule 11(c)(3) errors for harmlessness. *Id.*

Respectfully submitted,

Dated: June 22, 2001

JERALD BRAININ
Attorney for Respondent

No. 00-1643

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

vs.

HENRY ALEXANDER JONES, RESPONDENT

CERTIFICATE OF SERVICE

I, Jerald Brainin, hereby certify that on this ___ day of June, 2001, I mailed a copy of the Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, counsel for the Petitioner. All postage was prepaid.

Respectfully submitted,

Dated: June 23, 2001

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